ROBERT SEMANKO

IBLA 85-71 Decided April 22, 1986

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting noncompetitive oil and gas offer W-63144.

Affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Known Geologic Structure--Oil and Gas Leases: Noncompetitive Leases

Where an applicant gained first priority in a drawing, but issuance of a noncompetitive lease was delayed, first by litigation and subsequently by a Secretarial order, and during the interim the lands in that parcel were designated as within the known geologic structure of a producing oil or gas field, the offer was properly rejected.

APPEARANCES: Charles A. Grube, Esq., Milwaukee, Wisconsin, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Robert Semanko has appealed from a decision of the Bureau of Land Management (BLM), dated August 10, 1984, which rejected his simultaneous oil and gas lease offer in accordance with 43 CFR 3112.5-2(b) because the lands involved were determined to be within the Washakie Basin undefined known geologic structure (KGS) as of June 29, 1984.

The record shows that Semanko's offer for parcel WY-173 was originally drawn with first priority in the drawing conducted by the Wyoming State Office, BLM, in the February 1978 simultaneous drawing. The parcel, as posted at the time of the drawing, contained 1400 acres in the NE 1/4 SW 1/4, S 1/2 SW 1/4, SE 1/4 of sec. 8, T. 21 N., R. 95 W., and the W 1/2, SE 1/4 of sec. 12, and all of sec. 28, T. 21 N., R. 96 W., sixth principal meridian, Sweetwater County, Wyoming, and was referenced W-63144.

In April 1978 BLM questioned whether Semanko's use of a filing service, Resource Service Company, had violated the regulations forbidding multiple filings by a party on one parcel. After BLM had suspended consideration of

this case pending judicial action on similar appeals involving controlling issues of law, BLM held the agreement did in fact violate the regulations and rejected Semanko's offer, by decision dated March 13, 1981. Semanko filed an appeal to this Board, which affirmed BLM's decision. Robert Semanko, 58 IBLA 340 (1981). He then sought judicial review on January 18, 1982, in the United States District Court for the District of Columbia. Robert Semanko v. Watt, Civ. No. 82-165 (D.D.C.). In response to a joint motion of the parties the court reversed the Board's decision by an order dated September 9, 1983, and remanded the case to the Secretary to complete proceedings within 60 days in accordance with Lowey v. Watt, 684 F.2d 957 (D.C. Cir. 1982). 1/

On October 24, 1983, the Department issued notice of the suspension of simultaneous oil and gas leasing:

> The Bureau of Land Management periodically issues oil and gas leases in areas outside of known geologic structures (KGS) on a noncompetitive basis through a drawing of applications filed on selected parcels. The use of this method of issuing leases known as simultaneous oil and gas leasing is temporarily suspended. The September drawing will not be held until it has been verified that the parcels are not included in a KGS. Nor will leases be issued from previous drawings that were not processed and completed prior to October 12, 1983, until it is determined that they are not located within a KGS. [Emphasis added.]

48 FR 49703 (Oct. 27, 1983).

In light of this order, BLM could not issue any noncompetitive lease until the required KGS determination had been made. When the required examination was completed, the District Manager of the BLM Rawlins Office advised the Wyoming State Director by memorandum dated July 23, 1984, that the lands within this offer were entirely within Washakie Basin undefined KGS effective June 29, 1984. 2/ BLM therefore issued its decision rejecting appellant's offer.

Appellant argues the Department is estopped from rejecting the offer because it joined in the motion to the U.S. District Court that the Board's decision be reversed and the case remanded for proceedings that were to be completed within 60 days.

> The Government induced Mr. Semanko and RSC to join in a motion to reverse and remand the matter from the District Court by taking the position that Lowey v. Watt disposed of the action in favor

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1/ For a discussion of this decision see Mark Woods, 79 IBLA 129 (1984).

2/ A geologic report for this portion of the Washakie Basin KGS, and an isopachous map of the Net Upper Almond Formation Reservoir were filed with the Board Apr. 1, 1985, and copies were subsequently sent to appellant's counsel.

> of Mr. Semanko and RSC. Now, after ignoring the District Court's order and having obtained dismissal of the action from injunction, the Government manufactures a new defense not affected by Lowey v. Watt. This sort of intentional self-contradiction is forbidden by the doctrine of judicial estoppel[,]

appellant argues, citing Himel v. Continental Illinois National Bank & Trust, 596 F.2d 205, 210 (7th Cir. 1979); 1B Moore's Federal Practice § 0.405(8).

[1] We cannot accept appellant's analysis. A regular part of the processing of every noncompetitive oil and gas lease offer is a determination whether the lands applied for are within a KGS. If it is determined they are, the Department has no discretion to issue a lease because the Mineral Leasing Act mandates that such lands be leased only after competitive bidding. 30 U.S.C. § 226(b) (1982); McDonald v. Clark, 771 F.2d 460, 464 (10th Cir. 1985); McDade v. Morton, 353 F.2d 1156 (D.C. Cir. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974). A noncompetitive offer must be rejected for such lands even if the KGS determination has been delayed. Marc W. Richman, 86 IBLA 143 (1985). BLM did not contrive a new way to deprive appellant of a lease he was entitled to or act inconsistently with the Government's agreement to complete proceedings promptly. In accordance with the suspension notice effective October 27, 1983, BLM could not issue a lease until it determined whether the lands in appellant's offer were in a KGS. Once it determined they were, BLM acted the only way it could that is consistent with the statute. Its decision may not be estopped; rather, it must be affirmed. Frederick W. Lowey, 76 IBLA 195 (1983).

Appellant also argues that BLM may not apply new KGS determination procedures, adopted in 1984, as the basis for rejecting an offer filed in 1978, citing McDonald v. Watt, 653 F.2d 1035 (5th Cir. 1981). He presumes, on the basis of Instruction Memorandum No. 84-255, Change 1, dated May 14, 1984, that the new procedures caused more lands to be classified KGS than under the procedures applied before. We do not agree. Appellant's status gives him first priority for a noncompetitive lease but does not authorize issuance of a noncompetitive lease where the law requires competitive leasing. Satellite 8305141, 85 IBLA 307 (1985). Therefore, even if appellant had shown the lands in his offer would not have been determined to fall within a KGS under the former procedures, there is no legal impediment to BLM changing these internal procedures for making KGS determinations while appellant's offer is pending. 3/ McDonald v. Watt, supra, is inapposite: that case involved whether an interpretation of a regulation (concerning whether an applicant was the first qualified one for lands not within a KGS) should be applied prospectively only. The issue in this context is whether the facts support BLM's KGS determination, not whether a regulation has been properly applied. Appellant has not shown that the facts do not support the determination.

3/ For a general description of these procedures, see Peterson, "Lands Available for Leasing," chapter 3.13[3], in Rocky Mountain Mineral Law Foundation, Law of Federal Oil and Gas Leases (1985).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge